

“I Take You to Be My Lawfully Wedded Spouse”: Consent and Marriage in Early Modern Protestantism” (forthcoming)

**“I Take You to Be My Lawfully Wedded Spouse”:
Consent and Marriage in Early Modern Protestantism**

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Abstract

This short article, which is part of a symposium on the doctrine of consent in legal history, summarizes early Protestant contributions to the role of consent in the formation of a valid marriage. Sixteenth-century Lutheran and Calvinist reformers insisted that a valid marriage required consent by the couple, their parents, the church, and the state alike, signaling its critical private and public place in the community. Protestant jurists and theologians collaborated to introduce important changes in Western theology, liturgy, and law in reflection and application of this teaching.

Keywords: marriage, family, consent, community, marital vows, parental consent, church consecration, civil registration, marriage liturgy, family law

Weddings are both wonderful rituals of love and commitment and critical procedures of law and consent. Most readers will know – from observation or experience -- the sublime steps of the traditional church wedding service in most Western lands. To fanfare music, the beaming father (or mother) escorts the beautifully adorned bride up the aisle to the groom’s side. The officiant asks: “Who gives this woman to this man?” “Her mother (or father) and I,” comes the reply. After ritual words to the couple and community about the origin, nature, and purpose of marriage, the officiant asks the congregation if they know of any reason the couple should not be married, intoning gravely: “Speak now, or forever hold your peace.” The officiant then asks the bride and groom: “Do you take this man/woman to be your husband/wife.” Each says separately: “I do,” loudly and proudly. The couple exchanges rings and vows. In some countries, they also sign the state-supplied marriage certificate with the officiant as witness. Then comes the final declaration: “By the power of the state (or “church,” depending on the country) vested in me, I now declare you husband and wife.”¹

¹ See, e.g., Mark Searle and Kenneth W. Stevenson, *Documents of the Marriage Liturgy* (Collegeville, MN: The Liturgical Press, 1992); Kenneth W. Stevenson, *Nuptial Blessing: A Study of Christian Marriage Rites* (London: SPCK Press, 1982).

Today, same sex marriage church weddings have comparable rituals, with gender neutral language and more fluid roles.² Some churches, particularly Eastern Orthodox Christians, add many more liturgical steps to their weddings,³ as do some Jewish, Muslim, Hindu, and Indigenous communities.⁴ Non-religious civil ceremonies – say in Las Vegas chapels or judicial chambers – are usually shorter and thinner. But whether thick or thin, ornate or simple, most Western weddings today have these key moments of declaring consent -- by parents who deliver the new spouse; by the community who are invited to dissent; by the couple who exchange vows; and by the religious and/or civil officials who witness, certify, and preside over this celebration.

In the Western tradition, wedding prototypes of all sorts can be found already in ancient Hebrew, Egyptian, Greek, and Roman sources.⁵ But it was the sixteenth-century Lutheran and Calvinist Reformation that first systematically expounded and mandated clearly these four distinct layers of consent to forming a valid marriage -- consent by the couple, their parents, the state, and the church.⁶ To be sure, each individual form of consent had ample antecedents in medieval canon, civil, and common law sources.⁷ And to be sure, all four of these layers of marital consent were eventually brought together and mandated in Catholic canon law by the decree Tametsi in 1563 and later decrees,⁸ as well as in English ecclesiastical law by Lord Hardwicke's Act in 1753 and follow-up legislation.⁹ But it was the Lutheran and Calvinist reformers from

² See, e.g., Kimberly Bracken Long and David Mawell, eds., *Inclusive Marriage Services: A Wedding Sourcebook* (Louisville, KY: Westminster John Knox Press, 2015); Michael P. Foley, *Wedding Rites* (Grand Rapids, MI: Eerdmans, 2008); Andrew C. Stevens, "By the Power Vested in Me? Licensing Religious Officials to Solemnize Marriage in an Age of Same-Sex Marriage," *Emory Law Journal* 63 (2014): 979–1020.

³ John Meyendorff, *Marriage: An Orthodox Perspective* (Crestwood, NY: St. Vladimir's Press, 1975); Wendy Kennet, "The Place of Worship in Solemnization of a Marriage," *Journal of Law and Religion* 30 (2015): 260–94.

⁴ See examples in Don S. Browning, M. Christian Green, and John Witte, Jr., eds., *Sex, Marriage, and Family in World Religions* (New York: Columbia University Press, 2006); George Monger, *Marriage Customs of the World* (Santa Barbara, CA: ABC-CLIO, 2013).

⁵ Katherine Wasdin, *Eros at Dusk: Ancient Wedding and Love Poetry* (New York: Oxford University Press, 2018); Geoffrey David Miller, *Marriage in the Book of Tobit* (Berlin: DeGruyter, 2011); George Eliot Howard, *A History of Matrimonial Institutions Chiefly in England and the United States*, 3 vols. (Chicago: University of Chicago Press, 1904), 1:321–63.

⁶ See sources and analysis in John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 2d ed. (Louisville, KY: Westminster John Knox Press, 2012), 113-286.

⁷ See documents and analysis in Philip L. Reynolds and John Witte, Jr., eds. *To Have and to Hold: Marrying and its Documentation in Western Christendom, 400–1600* (Cambridge: Cambridge University Press, 2007) and James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago: University of Chicago Press, 1987).

⁸ *Concilium Tridentinum. Diariorum, actorum, epistularum, tractatum nova collectio*, ed. Görres-Gesellschaft (Freiburg: Herder, 1901–38), sess. 24 *de ref. matrim*, translated in H.J. Schroeder, ed., *Councils and Decrees of the Council of Trent* (St. Louis: B. Herder Book Co., 1941), 180-89.

⁹ 26 Geo. 2 c.33 with detailed analysis in Rebecca Probert, *Marriage Law and Practice in the Long Eighteenth Century* (Cambridge: Cambridge University Press, 2009) and later developments in Rebecca Probert, *Tying the Knot: The Formation of Marriage, 1836-2020* (Cambridge: Cambridge University Press, 2021).

1520 to 1560 who first put this fourfold consent system firmly in place in their marital theology and law.

These Protestant reformers rejected the medieval teaching that marriage is a sacrament, but one foreclosed to celibate clergy and monastics. Most people, Protestants argued, are too tempted by sinful passion to forgo God's soothing remedy of marriage. The celibate life, moreover, has no superior virtue and is no prerequisite for clerical service. Indeed, mandatory clerical celibacy can foment all manner of sexual sin by clerics and monastics who by nature often need sexual outlets. All adult persons of the age of consent – clerical and lay alike – should have the right to consent to marry, unless they have the rare natural gift of continence, Protestants concluded. It is cruel, unnatural, and dangerous to force parties to choose between marriage and religious service. Why not allow adults the freedom to choose and consent to both vocations?¹⁰

Early modern Protestants also rejected the medieval teaching that marriage is a sacrament.¹¹ Only once, they noted, in Ephesians 5:32, does the Bible mention that marriage is a “*mysterion*”; and, in the reformers’ view, the Latin Vulgate had mistranslated this Greek term as a “*sacramentum*.” What St. Paul is doing in this passage, they argued, is simply describing the loving and sacrificial union of a Christian husband and wife as a reflection, an echo, a foretaste of the perfect mysterious union of Christ and his church. But that analogy does not make marriage a sacrament. Only baptism and the eucharist are set out in the Bible as true sacraments that confer sanctifying grace.¹²

Moreover, Protestants argued, it makes no sense for the medieval Catholic Church to call marriage a sacrament without giving the clergy a role in this sacrament or providing a mandatory liturgy of preparation and celebration. Neither the husband nor the wife are, or can be, a cleric if they seek marriage. Yet regardless of what the couple knows or intends, the church says that these two laypersons perform a sacrament either (1) by making a present promise to marry (“I take you to be my husband/wife”); or (2) getting engaged and making a future promise to marry (“I promise to take you to be my husband/wife”), and then having sex. And that purported sacramental act binds them for life with no chance for remarriage until the death of their first spouse. This just piles fiction upon fiction, early Lutherans and Calvinists concluded. The Catholic Church forbids its clergy to marry because marriage is a natural association, purportedly beneath them in dignity. Yet the church pretends that a mere promise by laymen,

¹⁰ See esp. Martin Luther’s critique of celibacy analyzed in Witte, *From Sacrament to Contract*, 126-28.

¹¹ Philip L. Reynolds, *How Marriage Became One of the Sacraments: The Sacramental Theology of Marriage from its Medieval Origins to the Council of Trent* (Cambridge: Cambridge University Press, 2016); Philip L. Reynolds, *Marriage in the Western Church: The Christianization of Marriage During the Patristic and Early Modern Periods* (Leiden: Brill, 1994).

¹² See Luther’s and Calvin’s view recounted in John Witte, Jr. *Church, State, and Family: Reconciling Traditional Teachings and Modern Liberties* (Cambridge: Cambridge University Press, 2019), 72-105.

followed by sexual intercourse, creates a sacramental marriage -- though neither the clergy nor the church participate.¹³

Such a fateful permanent step in life needs far stronger safeguards to ensure informed consent, Protestants argued. It certainly should not be left to a passionate lay couple with little else on their minds than stripping down and rushing to the bedroom. And, as Carissa Harris's contribution to this collection so nicely illustrates, rape, coercion, seduction, and other forms of sexual manipulation were all too common in the late medieval times, as they are today.¹⁴ Sure, litigation to escape an unwanted life-long marriage based on dubious consent was theoretically available in medieval church courts. But it was well beyond the means for many -- doubly so if the woman fell pregnant or had no father or other male relative to protect or represent her.¹⁵

In place of medieval sacramental theology and canon law, the Lutheran reformers of Germany and Scandinavia argued that the marital family is a vital social estate. For them, God had created marriage for the earthlier purposes of mutual love and support of husband and wife, mutual procreation and nurture of children, and mutual protection from sexual sin and temptation. God had also created marriage as the foundational institution of society – the first school of love and justice, faith and works, education and charity on whose proper functioning the church, state, economy, education and welfare system ultimately depended. Marriage was thus an essentially public institution, in whose formation and maintenance the entire community needed to be invested – through the consensual participation and approbation of parents, peers, pastors, and princes alike.¹⁶

Calvinist reformers in sixteenth-century Western Europe and Great Britain taught that marriage is a covenantal association of the entire community. More than two dozen times, they noted, the Hebrew Bible refers to marriage as a “covenant” (*berit; diatheke*), modeled on the covenantal relationship between Yahweh and his chosen bride of Israel. Building on this biblical model, Calvinists argued that a variety of parties should participate in the formation of this marital covenant, each giving their consent at crucial stages. The marital parties themselves should swear their betrothals and espousals before each other and God -- rendering all marriages tripartite agreements, with God as third party witness, participant, and judge. The couple's parents, as God's lieutenants for their children, need give their consent to the union. Two witnesses, as God's priests to their peers in the priesthood of all believers, must serve as witnesses to the volition and validity of the engagement and marriage. The minister, holding God's spiritual power of the Word, needs to bless the couple and admonish them in their spiritual duties during the mandatory church wedding liturgy. The magistrate, holding God's

¹³ Ibid.

¹⁴ Carissa Harris, “Manipulating Sexual Consent,” *Past & Present* _ (2023): __-__.

¹⁵ See examples Charles Donahue, *Law, Marriage and Society in the Later Middle Ages* (Cambridge: Cambridge University Press, 2007); R.H. Helmholz, *Marriage Litigation in Medieval England* (Cambridge: Cambridge University Press, 1974).

¹⁶ See detailed sources and analysis in John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002), 199-256.

temporal power of the sword, must register the couple and protect them in their person and property after the compulsory state licensing. Each of these parties – parents and peers, ministers and magistrates -- was considered essential to the legitimacy of the marriage, for they each represented a different dimension of God's involvement in the covenant. To omit any such party was, in effect, to omit God from the marriage covenant.¹⁷

Protestant jurists in both Lutheran and Calvinist lands worked out in detail how each layer of consent should work, setting out the rules in major new marriage ordinances promulgated by the civil magistrates.¹⁸ They crafted these statutes in part based on the evolving rules of contractual consent and marital contract ably described by Wim Decock's chapter in this collection.¹⁹

First, these new laws mandated that engagement and marriage depended in its essence on the mutual consent of both the man and the woman who had the freedom and capacity to marry each other. Absent proof of free consent by both parties there was no marriage. Proof of the mutual promise to engagement and marriage required testimony from two or more witnesses. Proof of impediments of coercion, trickery, precontract, or other lack of evidence of fitness or capacity would lead to annulment. This was standard lore in the *ius commune*, and Protestant laws simply repeated it.

Second, the consent of the couple's parents or guardians was also vital to the validity of the engagement and the marriage. The consent of fathers was the more critical; maternal consent was required only when fathers were absent. In the absence of both parents, guardians would give their consent, again with priority for the male voice. Minor children -- men under 20, women under 18 in most Protestant lands -- who became engaged or married without such parental consent could have their unions annulled by either set of parents or guardians. Adult or emancipated children could proceed without their parents' consent, though they were strongly encouraged to get it. Protestant laws made clear that parental consent was a supplement to, not a substitute for, the consent of the couple themselves. Parents were prohibited, on pain of imprisonment, from coercing their children into unwanted unions, or withholding their consent or payment of dowry until the child chose a partner the parents favored. They

¹⁷ See detailed sources and analysis in John Witte, Jr. and Robert M. Kingdon, *Sex, Marriage, and Family in John Calvin's Geneva* (Grand Rapids, MI: Eerdmans, 2005); Cornelia Seeger, *Nullité der mariage divorce et separation de corps a Genève, au temps de Calvin: Fondements doctrinaux, loi et jurisprudence* (Lausanne: Mémoires et documents publiés par la société d'histoire de la suisse romande, 1989); and Robert M. *Adultery and Divorce in Calvin's Geneva* (Cambridge and London: Harvard University Press, 1995).

¹⁸ For detailed Lutheran sources in Emil Sehling, et al., eds. *Die evangelischen Kirchenordnungen des 16. Jahrhunderts* (Leipzig: O.R. Reisland, 1902-1913), vols. 1–5, continued under the same title (Aalen: Scientia Verlag, 1955–), vols. 6–24. See analysis Hartwig Dieterich, *Das protestantische Eherecht in Deutschland bis zur Mitte des 17. Jahrhunderts* (Munich: Claudius Verlag, 1970); Ralf Dieterich, *Eherecht und Ehegerichtsbarkeit in der Reformationszeit: Der Aufbau neuer Rechtsstrukturen im sächsischen Raum unter besonderer Berücksichtigung der Wirkungsgeschichte des Wittenberger Konsistoriums* (Tübingen: Mohr Siebeck, 2005); Saskia Lettmaier, "Marriage Law and the Reformation," *Law and History Review* 35 (2017): 461-510.

¹⁹ Wim Decock "Coerced Consent in Free Contracts," *___ Past & Present* (2023): ___-___.

were further prevented from forcing youngsters into marriage before they were mature enough to consent to and participate safely in the institution. Arranged and child marriages, which had been tolerated, were strictly out in Protestant lands.

Third, the consent of the broader political community and state was also vital. Betrothed couples were to register with a local civil magistrate, who would post notices of their pending nuptials and furnish the couple with a signed marriage certificate that established their common identity, property, and household. Couples were to file this registration thereafter with a local church, and both state and church officials who published banns of the pending nuptials, and invited the community to give notice of any impediments.

Fourth, marriages without church weddings were invalid in most Protestant lands. Church weddings were essential confirmations not only that the couple privately consented but also that the church and community publicly consented to the marriage. Particularly in Calvinist communities, the wedding itself took place in the church sanctuary during a regular Sunday service, save during the monthly or quarterly Sunday services when the Eucharist was celebrated. Only a sermon, not a sacrament, could be offered on the day that a wedding was celebrated, lest the religious dimension of marriage be exaggerated. And the full congregation participated in the wedding service, and several times were asked to pledge their consent, and make solemn promises of support and care for the couple and their hoped for children. All these steps were closely choreographed by both detailed state ordinances and lengthy church liturgies. This underscored a central point of early Protestant marriage theology and law -- that marriages were at once public and private, spiritual and temporal, ecclesiastical and political in nature and nurture.²⁰

These legal steps of marital consent gave rise to many thousands of cases before church tribunals and civil courts in Protestant lands eventually on both sides of the Atlantic. Many of these early modern marital cases, like much modern marital litigation, featured contests over consent – disputed and broken engagements; charges of seduction, rape, manipulation, or premarital fornication; allegations of impediments to engagements or weddings; objections to parents or guardians trying to block, bribe, or coerce engagements and marriages; engagement and marital property disputes between couples and their families; missteps in getting marriage licenses, publishing banns, arranging church services, and much more. The more ornate the statutory choreography of marital consent in early modern Protestant lands, the more crowded the marital dockets became. And the more intricate and intense the marital litigation, the more discordance there emerged between lofty theological models of pure consensual marital love and the real legal rough and tumble of marital and family lives.

²⁰ See sources in Witte and Kingdon, *Sex, Marriage and Family in John Calvin's Geneva*, 445-80 and prototypes in J.-B. Molin and P. Mutembe, *Le Rituel du mariage en France du XIIe au XVIe siècle* (Paris: Beauchesne, 1994); see analysis in Bryan D. Spinks, "The Liturgical Origins and Theology of Calvin's Marriage Rite," *Ecclesia Orans* 3 (1986): 195-210.